Azri Shahimi bin Abd Karim & Anor v Azman bin Jantan

HIGH COURT (MELAKA) — RAYUAN SIVIL NO MT1–12 – 35OF 2001
LOW HOP BING J
24 JULY 2003

Road Traffic *— Negligence — Collision between motorvan and motorcycle — Whether inferences made by trial judge supported by evidence — Whether there was error of law or fact in the apportionment of liability*

After a full trial, the learned sessions court judge ('the learned trial judge') came to a finding of facts that the first plaintiff was a motorcyclist travelling from the direction of Masjid Tanah to Tg Bidara while the defendant was driving his motorvan in the opposite direction when a collision took place between these two vehicles. The learned trial judge accepted the evidence of the investigating officer who testified that the first plaintiff's motorcycle sustained serious damage to the front portion while the damage to the defendant's motorvan was in the front right portion. The learned trial judge accepted the defendant's version that the collision took place on his side of the road. This was an appeal by the first plaintiff against the decision of the learned trial judge who apportioned the liability of the first plaintiff and the defendant as 85% and 15% respectively. The questions to be decided in this appeal were: (i) whether the learned trial judge's finding of facts was based on the credibility of witnesses or on inferences drawn from other facts; and (ii) whether the finding was wrong.

Held, dismissing the appeal:

(1) The finding of facts by the learned trial judge was based on the evidence of the investigating officer and the sketch plan. In the light of the conflicting versions of the first plaintiff and the defendant, the learned trial judge was at liberty to accept and did accept the defendant's version as credible. It was therefore based on the credibility of the investigating officer and the defendant, and supported by the sketch plan. Having regard to the entire evidence adduced for both the first plaintiff and the defendant, the court was unable to see anything wrong in that finding (see p 718D–E).

(2) The finding of the learned trial judge that the point of impact was at or around the point where the pieces of glass were mostly found, was supported by the cases of *Fatimah bt Derakman v Wan Jusoh bin Wan Kolok & Anor* [1994] 4 CLJ 537, and *Abdul Rahman v Soon Ah Hai* [1978] 2 MLJ 31. This was the trial judge's finding of a specific or primary fact based on conflicting testimony, and were not based on inferences drawn from

undisputed fact or facts deposed to by witnesses. In the circumstances, the court did not think that the learned trial judge's finding of facts was against the weight of evidence and so should not be interferred with on appeal (see p 719E). A

(3) There was no error of law or fact in the apportionment of liability by the learned trial judge. Therefore such apportionment should not be disturbed on appeal (see p 719G–H); *Uval & Anor v Zainal* [1970] 1 MLJ 74 followed. B

[Bahasa Malaysia summary

C

Setelah perbicaraan penuh, hakim mahkamah sesyen yang arif ('hakim perbicaraan yang arif') memutuskan keputusan fakta-fakta bahawa plaintif pertama adalah penunggang motosikal yang sedang dalam perjalanan dari Masjid Tanah ke Tg Bidara manakala defendan sedang memandu motorvannya dari arah yang bertentangan apabila perlanggaran ini berlaku di antara kedua-dua kenderaan ini. Hakim perbicaraan yang arif telah menerima keterangan pegawai penyiasat yang memberi keterangan bahawa motosikal plaintif pertama telah mengalami kerosakkan yang serius pada bahagian hadapannya dan motorvan defendan mengalami kerosakkan pada bahagian hadapan kanan. Hakim perbicaraan yang arif menerima versi defendan bahawa perlanggaran berlaku di bahagian jalanraya beliau. Ini merupakan rayuan plaintif pertama terhadap keputusan hakim perbicaraan yang arif yang telah mengagihkan liabiliti plaintif pertama dan defendan sebagai 85% dan 15% masing-masing. Persoalan-persoalan yang perlu dibicarakan di dalam rayuan ini adalah: (i) sama ada keputusan fakta-fakta hakim perbicaraan yang arif berdasarkan kebolehpercayaan saksi-saksi atau pada inferens yang diambil daripada fakta-fakta lain; dan (ii) sama ada keputusan itu salah. D E F

Diputuskan, menolak rayuan itu:

(1) Keputusan fakta-fakta itu oleh hakim perbicaraan yang arif berdasarkan keterangan pegawai penyiasat dan pelan lakaran. Memandangkan versi-versi yang bercanggah plaintif pertama dan defendan, hakim perbicaraan yang arif mempunyai kebebasan untuk menerima dan telah menerima versi defendan sebagai yang boleh dipercayai. Oleh itu, ia berdasarkan kebolehpercayaan pegawai penyiasat dan defendan dan disokong oleh pelan lakaran itu. Menimbangkan keseluruhan keterangan yang dikemukakan untuk plaintif pertama dan defendan, mahkamah tidak dapat melihat apa-apa yang salah dengan keputusan itu (lihat ms 718D–E). G H

(2) Keputusan hakim perbicaraan yang arif bahawa tempat perlanggaran itu adalah pada atau di sekeliling tempat di mana serpihan-serpihan kaca dijumpai, disokong oleh kes-kes *Fatimah bt Derakman v Wan Jusoh bin Wan Kolok & Anor* [1994] 4 CLJ I

537, dan *Abdul Rahman v Soon Ah Hai* [1978] 2 MLJ 31. In adalah keputusan hakim perbicaraan pada fakta yang khusus atau utama berdasarkan testimoni yang bercanggah, dan tidak berdasarkan pada inferens-inferens yang diambil daripada fakta-fakta yang tidak dipertikaikan atau fakta-fakta yang dideposkan oleh saksi-saksi. Di dalam keadaan ini, mahkamah tidak berpendapat bahawa keputusan hakim perbicaraan yang arif bertentangan dengan kepentingan keterangan dan oleh itu tidak patut diganggu pada rayuan (lihat ms 719E).

(3) Tiada kekhilafan undang-undang atau fakta di dalam pengagihan liabiliti oleh hakim perbicaraan yang arif. Oleh itu pengagihan itu tidak patut diganggu pada rayuan (lihat ms 719G–H).]

Notes

For cases on collission between motorvan and motorcycle, see 11 *Mallal's Digest* (4th Ed 1996 Reissue) para 318.

Satvinder Singh (*Manjeet & Associates*) for the first plaintiff.
R Nagarajah (*Wong Seng Chow, Nagarajah & Co*) for the defendant.

Cases referred to

A Perianayagam & Anor v Yeo Suan Tin & Anor [1984] 1 MLJ 214 (refd)
Abdul Rahman v Soon Ah Hai [1978] 2 MLJ 31 (refd)
Baker v Market Harborough Industrial Co-operative Society Ltd [1953] 1 WLR 1472 (refd)
Brown v Thompson [1968] 2 AER 708 (refd)
China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and Anor Appeal [1996] 3 CLJ 163 (refd)
Chock Kek Ling v Patt Hup Transport Co Ltd & Ors [1966] 1 MLJ 120 (refd)
Fatimah bt Derakman v Wan Jusoh bin Wan Kolok & Anor [1994] 4 CLJ 537 (refd)
Ingram v United Automobile Service, Limited, and others [1943] 1 KB 612 (refd)
Lee Suat Hong v Teo Lye [1988] 2 MLJ 537 (refd)
Macgregor, The [1943] AC 197 (refd)
Mohamed Bin Kasdi v Public Prosecutor [1969] 1 MLJ 135 (refd)
Ong Yam Chong & Anor v Chan Wah [1962] 28 MLJ 184 (refd)
Uval & Anor v Zainal [1970] 1 MLJ 74 (folld)

Appeal from: Civil Suit No 1-53-305 of 1997) (Sessions Court, Melaka) A

Low Hop Bing J:

Appeal B

This is an appeal by the appellant-first plaintiff ('the first plaintiff) against the decision of the learned sessions court judge who on 22 June 2001 apportioned the liability of the first plaintiff and the respondent-defendant ('the defendant') as 85% and 15% respectively.

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Facts of the case

After a full trial, the learned trial judge came to a finding of facts that the first plaintiff was a motorcyclist travelling from the direction of Masjid Tanah to Tg Bidara while the defendant was driving his motorvan in the opposite direction when a collision took place between these two vehicles. D

The learned trial judge accepted the evidence of the investigating officer who testified that the first plaintiff's motorcycle sustained serious damage to the front portion while the damage to the defendant's motorvan was in the front right portion. Most of the glass splinters were found on the defendant's side of the road, ie from Tg Bidara heading towards Masjid Tanah. E

The defendant's version that the collision took place on his side of the road was accepted by the learned trial judge in the light of the sketch plan and the aforesaid testimony of the investigating officer.

The first plaintiff's version was that he was following a factory bus F which was some 40m ahead of him and that at a speed of 60 to 70 kmph, he overtook the bus when there was room for him to do so. Meanwhile the defendant's van was overtaking another van, thereby resulting in the collision on his side of the road. This version was rejected by the learned trial judge who concluded that the first plaintiff in the process of overtaking the bus would have to proceed more to the middle and then the other side of the road. G

Submission for first plaintiff

Mr Satvinder Singh, learned counsel for the first plaintiff, submitted that the facts as found by the learned trial judge was not based on the demeanour H of witnesses and so on the authority of *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and Anor Appeal* [1996] 3 CLJ 163, this court could interfere with the finding of facts.

He added that based on the first plaintiff's police report, the first plaintiff did say that the defendant's motor van was overtaking another I vehicle and that the plaintiff's version should be accepted, on the basis of *Chock Kek Ling v Patt Hup Transport Co Ltd & Ors* [1966] 1 MLJ 120.

A He argued that the defendant's version should be rejected, relying on *Mohamed Bin Kasdi v Public Prosecutor* [1969] 1 MLJ 135; *Fatimah bt Derakman v Wan Jusoh bin Wan Kolok & Anor* [1994] 4 CLJ 537 (HC); *Abdul Rahman v Soon Ah Hai* [1978] 2 MLJ 31; and *Ong Yam Chong & Anor v Chan Wah* [1962] 28 MLJ 184.

B *Contention for the defendant*

Ms R Nagarajah, learned counsel for the defendant, contended that the finding of the learned trial judge was one of specific fact ie on which side of the road the collision took place and should not be disturbed, on the C authority of *Lee Suat Hong v Teo Lye* [1988] 2 MLJ 537 Singapore (CA).

It was argued for the defendant that the defendant's report was made three months after the collision and so should not be relied upon, and *A Perianayagam & Anor v Yeo Suan Tin & Anor* [1984] 1 MLJ 214 was cited in support thereof.

D Finally, she added that there was no error of law or of fact on the part of the learned trial judge and so the apportionment of liability should be upheld, citing *Uval & Anor v Zainal* [1970] 1 MLJ 74.

Decision on appeal

E

Finding of facts

Upon a proper perusal and careful consideration of the respective submissions, I am of the view that the appeal herein is based on a finding of facts.

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China Airlines cited for the plaintiff did not make any reference to demeanour of witnesses. Instead, the Federal Court through the judgment of Mohamed Dzaiddin FCJ (later CJ Malaya) at p 175 enunciated the principles which a court acting in an appellate capacity should apply when dealing with a lower court's finding of facts. These principles are as follows :

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(1) It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the findings of the Court below should be disturbed by a Court of appeal unless it appears that those findings are clearly wrong, and more especially that it H is undesirable to do so where the conclusions reached must to a large extent, depend on the credibility of the witnesses and the impression formed by a Court which has seen them and can judge their honesty and accuracy: (*Crofter Harris Tweed Co v Veitch* [1942] All ER 142 (HL) per Lord Porter at p 167)

I (2) On the other hand, there is a clear authority also from the House of Lords and followed by the Privy Council, which says that a distinction can be drawn between a finding of a specific fact which depends upon the credibility of witnesses and a finding of

> fact which depends upon inferences drawn from other facts. In the latter case, an appellate Court will more readily interfere with the trial judge's findings of fact and form an independent opinion than in the case of the former. That authority is the speech of Lord Reid in the House of Lord's decision in *Benmax v. Austin Motor Co Ltd* [1955] AC 370 followed later by the Privy Council in the Singapore case of *Tay Kheng Hong v Heap Moh Stemship Co Ltd* [1964] 30 MLJ 87 at p 94. Thus, in cases where there is no question of the credibility or reliability of any witness and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal Court is generally in as good a position to evaluate the evidence as the trial Judge ...: per Lord Reid in *Benmax* at p 376.

The questions before me are:

(a) whether the learned trial judge's finding of facts is based on the credibility of witnesses or on inferences drawn from other facts; and

(b) whether the finding is clearly wrong.

In my view, the finding of facts by the learned trial judge was based on the evidence of the investigating officer and the sketch plan.

In the light of the conflicting versions of the first plaintiff and the defendant, the learned trial judge is at liberty to accept and did accept the defendant's version as credible. It is therefore based on the credibility of the investigating officer and the defendant, and supported by the sketch plan.

Having regard to the entire evidence adduced for both the first plaintiff and the defendant, I am unable to see anything wrong in that finding. Hence, *China Airlines* can afford no support to the first plaintiff.

Next, in considering the first plaintiff's reliance on *Chock Kek Ling* to support the contention that the police report lodged by the first defendant should be accepted as credible, it is necessary for me to state that the decision of Raja Azlan Shah J (now HRH the Sultan of Perak) in relation to a police report in that case was to the effect that the report did not and would not contain everything under the sun but was merely the first step to bring the police machinery into effect.

It is pertinent to note that the first plaintiff's police report was lodged on 3 March 1997 when the accident took place on 14 December 1996, thereby showing a lapse of 79 days, or at least 30 days after he was discharged from the hospitals in Kuala Lumpur and Kinrara to which he was warded for 49 days. There was no explanation for the delay. That probably was the reason why the learned trial judge did not place any weight on it.

In *A Perianayagam* a police report was lodged three weeks after the accident and no explanation was given for the delay. Siti Norma Yaakob J (now FCJ) held, at p 215, that in cases of this nature, such delay has the effect of making the victim wiser after the event and he was liable to manufacture facts to hide the true state of affairs.

A In *Mohamed bin Kasdi*, which was cited for the first plaintiff, Ali J (later Acting CJ (Malaya)) explained that no hard and fast rule can be laid down for determining the credibility of a witness, but when a witness gives or makes two statements which differ in material particulars there must necessarily be ground for believing that he is not a truthful witness. It is clear to me that this case renders no assistance to the first plaintiff as the learned judge there was referring to the credibility and truthfulness of a witness, and not the demeanour of witnesses, which apparently is the ground relied upon by the first plaintiff's learned counsel to challenge the decision of the learned trial judge.

C In my view, the finding of the learned trial judge that the point of impact is at or around the point where the pieces of glasses are mostly found, is supported by the judgment of Lamin Yunus FCJ (later PCA) sitting as a High Court judge in *Fatimah bt Derakman* and *Abdul Rahman*.

In *Ong Yam Chong* cited for the defendant, Ong J applied the dictum of D Denning LJ (later MR) in *Baker v Market Harborough Industrial Co-operative Society Ltd* [1953] 1 WLR 1472, at p 1476 to the effect that where there is a collision in the centre of the road between two vehicles travelling in opposite directions on such a road, then in the absence of special circumstances, there is a prima facie presumption that both drivers are E negligent.

In any event, the point of impact in the appeal before me was not in the centre of the road but on the defendant's side of the road. This is the trial judge's finding of a specific or primary fact based on conflicting testimony, and are not based on inferences drawn from undisputed fact or facts F deposed to by witnesses.

In the circumstances, I do not think that the learned trial judge's finding of facts is against the weight of evidence and so should not be interferred with on appeal (see also Wee Chong Jin CJ Singapore in *Lee Suat Hong* at p 543).

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Apportionment of liability

Finally, there is in my view no error of law or fact in the apportionment of liability by the learned trial judge. Therefore such apportionment should H not be disturbed on appeal: per Ong Hock Thye CJ (Malaya) in *Uval* following *Brown v Thompson* [1968] 2 AER 708, 711 CA, affirming, among others Du Parcq LJ in *Ingram v United Automobile Service, Limited, and others* [1943] 1 KB 612, *The Macgregor* [1943] AC 197.

Conclusion

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I would therefore affirm the decision of the learned trial judge and hereby dismiss the appeal herein with costs.

Appeal dismissed.

Reported by Peter Ling